Supreme Court, U.S.
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Case Number _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GARY T. BROOKMAN, PRO SE, PETITIONER

V.

LLOYD M. BENTSEN,

SECRETARY OF THE TREASURY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED FOR REVIEW

Should the decision of the district court be vacated and immediate reinstatement and back pay be awarded as equitable relief ?

(reserved)

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28 U.S.C. 2106; Judicial Proc.; Determinations.;
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29 U.S.C. 621-634; Age Discrimination in Employment Act.;
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ADD'L. RULE:

CA-7; I.O.P. 6; AT 8

(reserved)

OPINIONS BELOW

Opinions issued by the Seventh Circuit Court of Appeals ; entered October 17, 1994 and August 27, 1993.

United States District Court for the Northern District of Illinois, Eastern Div., entered its opinion April 27, 1992,in case number 90-C-7299.

JURISDICTION

The basis of jurisdiction of the U.S. Distirct Court, the Seventh Circuit and the U.S. Supreme Court, is found at 5 U.S.C. 706: the scope of review provision within the Administrative Procedure Act, and also at 29 U.S.C. 621-634; the Age Discrimination in Employment Act. Petitioner, pro se, has found no language in these statutes to indicate otherwise.

This appeal is taken from the judgment of the Seventh Circuit, entered October 17, 1994.

STATEMENT OF THE CASE

I. Nature of the case

This is a wrongful discharge case brought under 29 U.S.C. 621-634, the Age Discrimination in Employment Act.

The district court reviewed, de novo, the decision of the Equal Employment Opportunity Commission, Washington, D.C., under authority granted by 5 U.S.C. 706; that provision of the Administritive Procedure Act allowing judicial review in the federal courts where substantial evidence, based on the pleadings, justifies such review of administrative final decisions.

II. Course of Proceedings

Based on appellant's complaint, supported by an Equal Employment Opprotunity (EEO) investigation, an EEO administrative law judge held a hearing on April 17 and June 7, 1990. The recommended opinion held in favor of the agency. Appellant filed a rebuttal

memorandum with agency, Washington, D.C., who issued its final agency decision; supporting the recommended opinion; acknowledging plaintiff established a prima facie case.

Appellant timely filed his complaint with the district court, alleging deficiencies in the recommended decision.

Trial was held on April 7-8, 1992, following the de novo standard of review. Both parties filed proposed findings of fact and conclusions of law.

Following the Seventh Circuit's affirmtion, on August 27, 1993, of the trial court's April 22, 1992 judgment, petitioner appealed to the U.S. Supreme Court (case number 93-846), based on the November 29, 1993 filing of his Petition for Certiorari. On January 10, 1994, the Supreme Court denied certiorari by letter. On June 15, 1994, Petitioner filed a trial court motion under federal civil rule 60(b), seeking inclusion in the record evidence showing Petitioner's continuing efforts in securing a trial transcript

into the record. On that same day, however, the trial court denied that motion. As a result, Petitioner filed a notice of motion, motion and memorandum of law, with appropriate exhibits; again under civil rule 60(b) and appellate rule 10(e), with the Seventh Circuit on July 5, 1994 (case number 94-2592). This time, the jurisdiction and appropriateness of this motion filing is allowed by the Seventh Circuit's Internal Operating Procedure number 6 as a "subsequent appeal", Petitioner asserts.

Defendant responded by filing motions; to apply for time extension; to move for "summary affirmance".

On October 17, 1994, the Seventh Circuit issued its judgment affirming the trial court's June 15, 1994 minute order.

On October 28, 1994, I phoned the Clerk of the Seventh Circuit as my notice of appeal; then followed up by letters to that same clerk; on November 8 and 16, 1994; thus confirming my "notice of appeal" of the October 17, 1994 judgment to the U.S. Supreme Court.

(reserved)

The genesis and pre-trial history of this age discrimination case is narrated at pages 1 and 2 of the April 22, 1992 findings of fact, conclusinns and order issued by the district court.

Shortly after filing the notice of appeal, plaintiff also filed with the district court clerk:

1. order form - trial transcript.

2. in forma pauperis application. An orig-ind application was filed when case 90-C-

7299 was filed; this May 1992 application was filed showing current financial information.

The district court has not responded to the transcript request. Plaintiff then filed his FRAP 10(c) statement of certain evidence with the district court. At the June 25th status hearing, Judge Hart heard plaintiff say defendant never filed objections or clarifications to the statement. Defense counsel told the court a transcript "probably" would be ordered by the U.S. Attorney's office. Based on that, Judge Hart denied the 10(c) motion. Subsequent phone calls from defense counsel implied a transcript would be forthcoming. Considering the extended filing dates for all briefs in this appeal, plaintiff took two basic courses of action:

1. continued preparing appellant's brief; deciding, in the circumstances, to compile brief solely on trial exhibits.
2. issued letters on July 7 and 9 to the

U.S. Attorney's office, outlining discussions up to that point.

On July 10th, one of the defense counsel members again phoned plaintiff; this time saying a trial transcript will not be forthcoming, after all.

III. Matters of Equity

Turning now from procedural facts to the matter of equities in this appeal:

The most striking inequity is the significant and unfavorable difference with which plaintiff was treated by two different groups of evaluators. To adequately explain this difference, some factual background information is necessary.

Defendant agency (I.R.S.) delinieates its revenue agent training into consecutive phases. During his employment, plaintiff participated in two phases; each composed of tax law classes and on-the-job (OJT) closely supervised processing of individual income tax audit casefiles. As a denied judicial notice motion shows, plaintiff completed

Phase I classroom by meeting or exceeding 86% of all modular objectives. Then he completed Phase I OJT by being promoted to Phase II training with recommendation of "average" supervision, where "average" and "maximum" are the two choices.

Relations between plaintiff and Phase I instructional staff, OJT group manager and coaching instructor (OJI) were excellent at all times.

Relations between plaintiff and Phase II instructional staff was also excellent. Of a required 70%-of-objectives standing, plaintiff achieved 69.5%. He was working a second job weekends at the time, putting additional pressure on him. Instructional staff responded by promoting plaintiff to Phase II OJT, but recommending "maximum" supervision.

Relations between plaintiff and Phase II OJT group manager and two OJI's were strained; almost from the beginning.

While employed, plaintiff was told one

set of reasons for certain actions taken; such as switching OJI assignments from one person to another; such as alleged time extension of Phase II training. Subsequent to termination, and through plaintiff's pro se evidence-gathering efforts, which followed publication of the EEO report of investigation, plaintiff found the record recited an entirely different set of reasons given; the latter set in a less favorable cast.

The evidence of the disparate elements is complex and very detailed, due to the nature of a revenue agent's job. Pro-se plaintiff has included those details with each argument; arranged topically, next.

ARGUMENT

I. The record on appeal.

Pro-se petitioner in the cause entitled on the cover, Gary T. Brookman, believes and argues that: ".1. A review on writ of certiorari...(should and)...will be considered:

(a) When a United States court of appeals has...so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this (United States Supreme) Court's power of supervision."

28 USCA, Rules of Supreme Court, R.10.1 and R. 10.1(a).

The Seventh Circuit court of appeals, on August 27, 1993, decided, among other issues, that:

"Given the absence of evidence from the trial, we cannot ascertain whether the district court's findings are clearly erroneous. We therefore affirm the district court's findings."

App. 5

And yet, the Seventh Circuit also finds that: "...Brookman argues that he effectively complied with Rule 10(b) because he timely filed a trial transcript order form, yet the district court never responded to his

request."

App. 4

Brookman, the pro-se petitioner, filed trial exhibits with the Seventh Circuit clerk. He heard nothing from the court reporter as to costs; required under Fed. R. App. P.10(b)(4). Brookman, an in-forma pauperis applicant for purposes of the trial court proceeding and the Seventh Circuit appeal, therefore reasonably concluded that defendant would pay the costs of the trial transcript.

According to the Rules:

"The order(for a transcript of proceedings) shall be filed with the clerk of the district court." "If no parts of the proceedings are to be ordered...the appellant shall file a certificate to that effect."

Fed.R. App. P.10(b)(1)

Petitioner never filed such a certificate. In Ligares v. Harris,128 F.2d 582,583(CA-7, 1942), plaintiff's "...elaborate notice of appeal, we believed, was the equivalent of a statement of points, and his failure to

meet the requirements of the rule in this respect was not fatal (to his appeal)."

The Ligares court was ruling under Fed. R. Civ. P. 75(d), 28 USCA.

"Throughout his main brief and his reply brief, Brookman cites to a volume of exhibits that he filed along with his main brief. The volume contains what purport to be exhibits from his trial, though none of them are part of the record on appeal."

App. 3

Brookman argues that these findings are an enigma. This is because:

1. "All of the exhibits offered by the parties were received in evidence without objection."

App. 10

2. "Defendant produced the administrative record..."

App. 10

3 The trial court reported that it engaged in"...a de novo hearing and consideration of the evidence..."

App. 10

4. The Rules provide that:

"If anything material to either party is omitted from the record by error or accident ...the court of appeals...of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted."

Fed. R. App. P.10(e), 28 USCA

II. The "clearly erroneous standard" as to trial court findings, under Fed. R. App. P. 52.

One reason the Question Presented for Review appears in this petition is that the defendant, following exhaustion of administrative proceedings,"...concluded that plaintiff had made a prima facie case."

App. 18

However, the trial court evidently followed the defendant's prima facie case formulary but found that "...because a hiring freeze was in effect, the I.R.S. did not seek a

replacement for plaintiff. Accordingly, he did not present a prima facie case."

App. 17 18

And yet:

1. Defendant, as the U.S. Treasury Dept., initiated the hiring freeze.

App. 14

2. Defendant also admitted that plaintiff had established a prima facie case.

App. 18

Hence, yet another enigma.

Pro-se petitioner Brookman's appellate and reply briefs cite example after example where task and casefile performances of two other trainees, each under 40 years of age, were substandard when compared to Brookman's performance. However, both under-age 40 trainees were retained after Brookman's employment was terminated.

Most trial exhibits were authored by Brookman and the two under-age 40 trainees. The Seventh Circuit would naturally seek confirmance of plaintiff's legal brief

assertions. Unfortunately, the Seventh Circuit was placed in the position of considering numerous trial exhibits not certifed by the trial court; (not) part of the record on appeal."

App. 3

Moreover, witness' testimonies are denied to the Seventh Circuit, as argued above, at Argument, section I.

The Supreme Court has provided guidance in similar situations and, at the same time, has succintly interpreted Fed. R. Civ.P.52: "A finding is'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' "
"The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of

the witness' testimony was conflicting."

United States v. United States Gyp-Co., 333 U.S.364, 395; 92 L. Ed. 746,766.

But how does the holding in U.S. v United States Gypsum Co. related to the instant case? The answer appears in a side-by-side comparison:

In U.S.v. U.S. Gypsum Co., the Court realized that: "Since the appellee's motion to dismiss...was sustained, the appellees introduced no evidence...The documentary exhibits present a full picture of the circumstances surrounding...(the merits of the case)...and are chiefly relied on by the government to prove its case."

92 L. Ed, at 754.

In the instant case, the Seventh Circuit wrote about two observations:

First:

"...(petitioner) Brookman cites to a volume of exhibits that he filed along with his main brief. The volume contains what purport to be exhibits from the trial, though none of them are part of the record on appeal." (emphasis added)

"..., the record on appeal does not contain the transcript of the bench trial. We are therefore unable to conduct any sort of menaingful review of the trial court's findings." (emphasis added)

App., at 3.

Second:

"Given the absence of evidence from the trial, we cannot ascertain the distrit court's findings are clearly erroneous. We therefore affirm the district court's findings."(emphasis added)

App., at 5.

Contrary to its ruling in the instant case, the Seventh Circuit observed that "(1) Ms. Anderson (the appellee)...filed a motion to dismiss this appeal...on the grounds that Mr. Rodriquez (the appellant) failed to file a full transcript of the proceedings...(appellant) has responded that he filed the complete transcrip of the relevant portions of the trial..."

Id, as cited next, at 551.

"..., because a full transcript was finally submitted by...(appellant)..., (appellees') motion to dismiss this appeal is Denied."

Rodriquez v. Anderson,
973 F.2d.550; 551;555
(7th Cir. 1992)

In his appellate briefs and in this petition, Petitioner Brookman has demonstrated that he, a non-lawyer, in-forma pauperis litigant, did everything he knew to do to arrange for transmitta of a record complete witha full transcript and exhibits of trial, to the Seventh Circuit.

Based on above argument, Petitioner strongly suggests that the Seventh Circuit created conflicts, as follows:

1. A conflict between Rodriquez; 973 F.2d., at 555, and this instant case. Again, appellants in each case demonstrated their good-faith efforts at securing their respective records on appeal to the Seventh Circuit, who granted further pendancy in Rodriquez' favor. Brookman, the Petitioner in this instant case, was twice denied further pendency.

2. A conflict between the seventh Circuit and the Supreme Court. In a labor relations case, a novel question of importance to the

general public involving an attempt at excluding certain employees from collective bargaining status. The Supreme Court "...granted the Board's petition for certiorari...to resolve the conflict among the Courts of Appeals respecting the propriety of the Board's practice of excluding from collective bargaining units only those confidential employees with a 'labor nexix',..."

N.L.R.B. v. Hendricks County Rural Electric Membership Corporation, 454 US 170, at 177, 70 L. Ed. 323 at ___, 102 S.Ct. 216, at 221-222; text; also note 8.

In the instant case, Petitioner argues that the Seventh Circuit's failure to order transmittal of the complete record on appeal presents a question of vital importance to the general public. After all; Rodriquez was assisted in a similar effort. 973 F.2d. at 555; yet Petitioner was not.

3. Concerning its own role in recognizing important questions, for certiorari purposes, "...it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement

of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrasing conflict of opinion and authority between the circuit courts of appeals."

Layne & Bowler v. Western Well Works, 261 US 387,393 (1923), 43 S.Ct.422 at ___, 67 L. Ed. 712 at 714.

Next, as regards the record-on-appeal issue, Petitioner argues that he was effectively denied procedural due process, based on the presentation above. The Supreme Court has granted certiorari ..."Where,..., a possible due process violation is apparent on the particular facts of a case, we are empowered to consider a due process issue.[5]"

(and then, from note 5):

"(Where)..., there is ample support for a remand required in the interests of justice. See 28 U.S.C.(section)2106..."

Wood v. Georgia, 450 US 261 at 265-266 (text; note 5); 67 L. Ed. 2d 220 at 226, 101 S.Ct. 1097 at 1100.

Finally, Petitioner argues that the Seventh

Circuit violated its own formula for determining "abuse of discretion" when denying a civil rue 60(b) motion. Specifically, since the Seventh Circuit clearly failed to assist Petitioner in his efforts at secruing record transmittal to the Seventh Circuit (considering that Petitioner and Seventh Circuit agree that trial exhibits and transcript are needed for appellate review); "Abuse of discretion in denying a 60(b) motion is established only when no reasonable person could agree with the...Court;..."

Cline v. American Airlines, Inc (an unpublished opinion under circuit rule 53), as number 90-1096; decided February 20, 1991; page 3; sectionII.A.

Appellee cited Cline in its "Motion for Summary Affirmance".

The Seventh Circuit cited Cline in its October 17, 1994 judgment in this instant case; at 1.

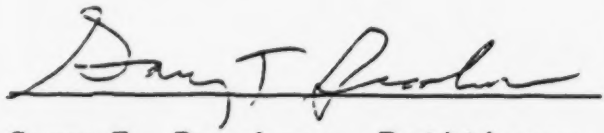
App., at ___.

(reserved)

CONCLUSION

For the foregoing reasons, the petitioner pro-se, Gary T. Brookman, respectfully requests that a writ of certiorari issue to the Seventh Circuit Court of Appeals, so that its judgment and opinion may be reviewed and reversed.

Respectfully submitted,



Gary T. Brookman, Petitioner
pro-se,

P. O. Box 986

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United States Court of Appeals

jc

For the Seventh Circuit
Chicago, Illinois 60604

October 17, 1994

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

GARY T. BROOKMAN, Plaintiff-Appellant, No. 94-2592 v. NICHOLAS F. BRADY, Defendant-Appellee.	] Appeal from the United] States District Court for] the Northern District of] Illinois, Eastern] Division.]] No. 90 C 7299]] William T. Hart,] Judge.]

The following is before the court:

1. **MOTION TO VACATE THE JUNE 15, 1994 MINUTE ORDER OF TRIAL COURT DENYING MOVANT'S JUNE 1994 MOTION, FILED UNDER CIVIL RULES 60(b)(6) AND 80(c) (FOR SUMMARY REVERSAL)** filed July 19, 1994, by the pro se appellant.

2. **DEFENDANT-APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE** filed September 20, 1994, by counsel.

3. **REPLY TO THIS COURT'S AUGUST 12, 1994 ORDER** filed August 19, 1994, by the pro se appellant.

We have determined that the district court did not abuse its discretion in denying plaintiff-appellant's motion for Rule 60(b) relief. See Cline v. American Airlines, 925 F.2d 1468 (7th Cir. 1991). Accordingly,

The district court's order of June 15, 1994 is summarily **AFFIRMED**.

App 1

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS
SUBMITTED AUGUST 17, 1993 *
DECIDED AUGUST 27, 1993

Before

MANION, Circuit Judge

ROVNER, Circuit Judge

FAIRCHILD, Senior Circuit Judge

GARY T. BROOKMAN, Plaintiff-Appellant

v.

LLOYD M. BENTSEN,** Secretary of the Treasury,

Defendant-Appellee

Case Number 92-2063

ORDER

Following a bench trial, the district court found that the Internal Revenue Service discharged Gary T. Brookman from his position as a revenue agent trainee due to unsatisfactory performance, based on evidence that the court characterized as "overwhelming." The court concluded that Brookman, 47 years old at the time of his discharge, had failed to present a prima facie case of age discrimanation under 29 U.S.C. 621 et seq.[1] The court entered judgment in favor of the defendant and

App 2

dismissed Brookman's action.

Brookman has appealed to this court. Although his brief is difficult to decipher, he is apparently challenging the district court's findings of fact.[2] The standard of review for such a challenge is whether or not the district court's findings are clearly erroneous. Nemmers v. United States, 870 F.2d 426,429 (7th Cur. 1989).

As the defendant points out, the record on appeal does not contain the transcript of the bench trial. We are therefore unable to conduct any sort of meaningful review of the trial court's findings. Throughout his main brief and his reply brief, Brookman cites to a volume of exhibits that he filed along with his main brief. The volume contains what purport to be exhibits from the trial, though none of them are part of the record on appeal. It is therefore inappropriate to rely on them for factual support in this appeal. Circuit Rule 28(d)(2); Holmberg v. Baxter HealthcareCorp., 901 F.2d 1387, 1392 n.4 (7th Cir. 1990).

App 3

Brookman insists that he can rely on any of the evidence admitted at trial, even if it is not in the record on appeal. Reply Br. 2-3. This is incorrect, as Rule 10(b)(2) of the Federal Rules of Appellate Procedure makes clear: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relavant to such finding or conclusion."

Alternatively, Brookman argues that he effectively complied with Rule 10(b) because he timely filed a trial transcript order form, yet the district court never responded to his request. Reply Br. 4. Brookman cites a document titled "Seventh Circuit Transcript Information Sheet" in his volume of exhibits that he claims shows that he filed the order form, but this document is not in the record on appeal. Moreover, even if we were to consider it, it indicates on its face that Brookman has made no payment as of that time. Under Rule 10(b)(4),

App 4

"(a)t the time of ordering, a party must make satisfactory arrangement with the reporter for payment of the cost of the transcript." See also In Re Mix, 901 F. 2d 1431,1433 (7th Cir. 1990)(per curiam)(noting that the information sheet "is only an order and ...counsel must arrange for payment" of the transcript). The document Brookman cited therefore fails to show that he compled with Rule 10(b).

Given the absence of evidence from the trial, we cannot ascertain whether the district court's findings are clearly erroneous. We therefcre affirm the district court's findings. See Fed. R. App. P. 3(a); Wilson v. Electro Marine Systems, Inc., 915 F.2d 1110, 1117 (7th Cir. 1990); Fisher v. Krajewski, 873 F.2d 1057, 1060-61 (7th Cir. 1989).

We also conclude that the district court's legal conclusions are valid. In order to prevail on an age discrimination claim, the plaintiff must prove, among other things, that his job performance was meeting the employer's legitimate expectations. United States Equal

App 5.

Employment Opportunity Comm'n v. Century Broadcasting Corp., 957 F.2d 1446, 1450 (7th Cir. 1992). As previously explained, we accept the district court's findings, which include a finding that Brookman was performing unsatisfactorily. Thus, Brookman clearly failed to extablish a necessary element of his age discrimination claim.

Because we cannot cnnclude that the district court's factual findings are clearly erroneous, and because the conclusions of law are correct based on those findings, we affirm the district court's judgment dismissing Brookman's claim.

AFFIRMED

FOOTNOTES

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." Fed. R. App. P.34(a); Circuit Rule 34(f). No

App 5

such statement having been filed, the appeal has been submitted on the briefs and record.

** Lloyd M. Bentsen is substituted for his predecessor, Nicholas F. Brady, as Secretary of the Treasury. Fed. R. App. P. 43(c)(1).

1. Alternatively, the court concluded that, even if Brookman had established a prima facie case, the defendant had met its burden by coming forward with a legitimate reason for the discharge that was not pretextual.

2. Brookman's brief argument concerning the Civil Rights Act of 1991, 42 U.S.C. 2000 et seq., is irrelevant to this appeal because Brookman sued under the Age Discrimination in Employment Act, 29 U.S.C. 621-34.

##########

IN THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

GARY THOMAS BROOKMAN, No. 90 C 7299

Plaintiff,

v.

NICHOLAS F. BRADY, Secretary
of the Treasury,

Defendant.

Decided
April 27,
1992

FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

I. Introduction

Plaintiff Gary Brookman was employed by the Internal Revenue Service ("IRS") as a revenue agent trainee. At the completion of a probationary period he was discharged. At the time of his discharge he was 47 years old. Plaintiff made complaints of age discrimination, handicap (learning disability) discrimination and reprisal to the Treasury Department. He later withdrew the handicap and reprisal complaints. The Department found no discrimination and plaintiff requested an administrative hearing. The administrative law judge found no discrimination. The Department disagreed with the legal standard utilized by the law judge but adopted the findings and conclusion in the administrative decision.

App 8

The Department notified plaintiff of its final dicision on November 20, 1990, also advising him of the time limit for appealing to the Equal Employment Opportunity Commission's Office of Review and Appeals, which is 20 days. Plaintiff, however, filed this pro se action rather than an appeal. Thereafter this court found that exhaustion is not a jurisdictional requirement and lacking any motion from defendant for dismissal on exhaustion grounds, concluded that it was unnecessary to decide whether plaintiff's action should be dismissed on exhaustion grounds. See Order dated February 21, 1992.

Plaintiff sought the appointment of counsel, claiming that he was unable to afford an attorney and that the issues were such that he needed legal assistance. Counsel was appointed on October 15, 1991. On January 24, 1992, court appointed counsel reported his review and efforts on behalf of plaintiff and requested that he be relieved from the appointment. This motion was granted without

objection on the part of plaintiff. The court excused plaintiff from preparing a pretrial order and set the case for a bench trial, neither party having demanded a jury trial.

At the bench trial, plaintiff was permitted to testify in narrative form. Defendant produced the administrative record and arranged for the production of such witnesses as plaintiff wished to call. All of the exhibits offered by the parties were recieved in evidence without objection. After a de novo hearing and consideration of the evidence, the court finds as follows.

II. FINDINGS OF FACT

1. Plaintiff was 47 years of age when hired by the IRS as an internal revenue agent trainee. His date of birth is March 31, 1939. He graduated from college in 1966 with a concentration in accounting. Plaintiff has been employed by many firms, but none for a period longer than four years. He is currently employed as a security guard and a school bus

driver.

2. Internal revenue agents are persons with accounting training who examine and audit the records of individual taxpayers, and corporate taxpayers, and other entities in order to determine tax liability. This work requires knowledge of the tax laws and regulations as well as a knowledge of accounting. Agents must be able to meet with taxpayers and their representatives and be able to perform audits and investigations. To qualify to be hired at the GS-5 level, the agent must have four years of college study, which must include at least 24 semester hours of accounting.[1] Agents may qualify for a starting level of GS-7 or GS-9 based on the standing in their college class and/or graduate level study. The IRS actively recruits trainees who have had experience in accounting. Many persons over 40 years of age are hired. Agents usually progress to level GS-11 and may compete for higher grades up to GS-13. Supervisors can advance to even higher levels.

App 11

Plaintiff presented a statement of experience which was judged sufficient to qualify him to start at the GS-7 level.

3. On February 17, 1987, plaintiff began his employment as a probationary internal revenue agent trainee. The training program consisted of Phase I classroom sessions. Phase I on-the-job training ("OJT"), Phase II classroom sessions and Phase II OJT. Plaintiff passed the Phase I classroom examination. At the end of the Phase I OJT, plaintiff had 13 incomplete audits. Plaintiff failed the Phase II classroom examination. He was allowed to participate in the Phase II OJT with the stipulation that he be given maximum supervision. At the termination of the Phase II OJT, plaintiff had 10 incomplete audits and his OJT period was extended.

4. Plaintiff's OJT instructor and group manager testified that plaintiff consistently failed to meet training expectations. When plaintiff's Phase II training was extended, he was assigned a more senior instructor-coach.

However, he continued to fail in meeting training objectives. The evidence shows that plaintiff failed to complete his assignments in a satisfactory manner and on a timely basis. His written work was difficult to follow. He did not provide an "audit trail", and showed poor judgment in dealings with taxpayers. A witness assigned to accompany plaintiff on his visits to taxpayers related his mistakes in field work. In one instance, plaintiff prematurely closed an audit in which it appeared that there was approximately $29,000 in unreported income. In another instance he asked a taxpayer to produce for inspection sewer-water damaged records when alternative contemporaneous records would have been sufficient. In general, his taxpayer interviews were too long. The evidence also supports a failure to adequately comprehend and apply the tax laws and regulations. Other examples of poor performance are also documented in the administrative record.

5. On December 14, 1987, the Examination

Probationary Review Committee recommended to the District Director that plaintiff be discharged for failure to meet the objectives of the training program. On January 22, 1988, plaintiff was notified that he would be removed effective February 5, 1988. At the time plaintiff was discharged, the IRS was under a hiring freeze and was not authorized to add a replacement trainee. It wasnot until approximately three years later that it was able to fill the position.

6. Plaintiff stated at the hearing that he knows of no facts which lead him to believe that he was the victim of age discrimination other than the fact that others outside (and inside) the protected group were no better able to complete assigned objectives and yet they were not discharged. However, plaintiff's references to the work of others, both at the trial and in the administrative evidence included in the record, does not show disparity. His comparisons are scant and incomplete. There is no evidence of invidious

treatment. Nothing comparing to the poor performance of plaintiff was shown.

7. The IRS seeks experienced persons for the position of internal revenue agent. Others in plaintiff's training group were over 40 years of age. Some have been retained and others have left the service. The evidence is overwhelming that the IRS extended every effort to assist plaintiff in his efforts to qualify for the position he sought. The evidence is also overwhelming that plaintiff's performance was unsatisfactory with respect to quality of written reports, organization, timeliness, documentation and dealings with taxpayers. Plaintiff's attempt to compare himself to others is unpersuasive.

8. The IRS has articulated a legitimate nondiscriminatory reason for the discharge of plaintiff. Plaintiff has not shown that the reason for his discharge was in any sense pretextual. The court is, on the contrary, impressed with the efforts of the IRS to teach plaintiff the required skills of the job and

investigation of whether or not he was handicapped by a learning disability. (It was determined that he did not have a learning disability.)

III. CONCLUSIONS OF LAW

A plaintiff alleging age discrimination must prove "that he would not have been discharged 'but for' his employer's motive to discriminate against him because of his age." United States Equal Employment Opportunity Commission v. Century Broadcasting Corp., No. 90-3210, slip op. at 2 (7th Cir. March 23, 1992)(quoting Karazanos v. Navistar Int'l Trans. Corp., 948 F.2d 332, 335 (7th Cir. 1991). The ultimate issue at trial is whether age was a determining factor in the employer's decision. Century Broadcasting Corp., slip op. at 2.

Plaintiff may attempt to meet the burden of proof by presenting direct or circumstantial evidence that age was the determining factor in his discharge or may (h)e utilize the indirect, burden-shifting methof of proof.

Karazanos, 948 F.2d at 335. Ordinarily, the prima facie elements fo the burden-shifting method in a discharge case are: (1) plaintiff is in a protected group (between the ages of forty and seventy); (2) his job performance met his employer's legitimate expectations; (3) he was discharged; and (4) his employer sought a replacement. Id. The existance of these elements establishes a rebuttable presumption. Upon proof of a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge. If the employer provides such a reason, the burden is on the employee to show that the proffered reason is a pretaxt. Id. at 335-36 (quoting Weihaupt v. American Medical Ass'n, 874 F.2d 419, 427 (7th Cir. 1989).

IN the instant case, the evidence shows that plaintiff was not meeting his employer's legitimate expectations. Moreover, because an employment freeze was in effect, the IRS did not seek a replacement for plaintiff. Accord-

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ingly, he did not present aprima facie case.

Alternatively, plaintiff could make out a prima facie case by showing (1) he is in a protected group (between the ages of forty and seventy); (2) he is similarly situated to members of the unprotected class; and (3) he was treated differently (i.e. less favorably) that those in the unprotected class. See McMillan v. Sventanoff, 878 F.2d 186,189 (7th Cir. 1989); Collins v. State of Illinois, 830 F.2d 692, 698 (7th Cir. 1987). Plaintiff, however, failed to show that others were similarly situated in that he failed to show any other employee had as poor a job performance as he did.

The Department of the Treasury, though, adopted the decision of the administrative law judge on a different formulation of plaintiff burden and concluded that plaintiff had made a prima facie case. Accordingly, it proceeded to adopt the position of the administrative law judge by considering whether or not plaintiff had proven that the proffered reason for his discharge was a pretext.

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Finding that it was not, it adopted the alternative ruling of the administrative law judge. Therefore, this court has also considered the reason advanced by the IRS for plaintiff's discharge and also concludes that plaintiff has failed to prove that the reason is a pretaxt. La Montagne v. American Convenience Products, Inc., 750 F.2d 1405,1409 (7th Cir. 1984). Defendant put forth a substantial effort to improve plaintiff's performance and had substantial grounds for discharging him. Plaintiff has not shown that the basis for discharging him was pretext.

IT IS THEREFORE ORDERED that the Clerk of the Court is directed to enter a judgment on the merits in favor of defendant and against plaintiff dismissing plaintiff's cause of action with predudice and with costs assessed against plaintiff. If plaintiff wishes to appeal this order, he must file a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit with the Clerk of the Court, United States District Court, 219 Sough Bearborn Street, 20th Floor, Chicago, Illinois

60604, within thirty (30) days of the entry of this order. Plaintiff is further admonished that the Court of Appeals may impose sanctions if it concludes that plaintiff's appeal is frivolous. Fed. R. App. P. 38.

ENTER:

/s/
William T. Hart
United States District
Judge

FOOTNOTE

[1] Six semenster hours of business law may be counted as part of the 24 semester hours of accounting. Also, certain accounting or auditing experience can be substituted for all or part of the education requirement.